No. 85662

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

BRENDA SELF,

Appellant.

Appeal from the Circuit Court of Pemiscot County, Missouri
34th Judicial Circuit, Division II
The Honorable Byron D. Luber, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for the class C misdemeanor of failing to cause a child to attend school on a regular basis, §§ 167.031 and 167.061, RSMo 2000, obtained in the Circuit Court of Pemiscot County, the Honorable Byron D. Luber presiding. Appellant was sentenced to fifteen days in the county jail, with a suspended execution of sentence and two years of probation. Because appellant challenges the constitutionality of the compulsory school attendance law, § 167.031, RSMo 2000, alleging that it is void for vagueness, this Court has jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Brenda Self, was charged by information with the Class C misdemeanor of failing to cause a child to attend school on a regular basis (L.F. 1). After a bench trial, which was held on October 6, 2003, appellant was found guilty of the charged offense (Tr. 12). Appellant does not challenged the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

During the 2002-2003 school year, appellant was charged with the care, custody, and control of her fourteen-year-old daughter, Jennifer Self (Tr. 3-4).[1] Between August 22, 2002, and February 6, 2003, Jennifer, who lived with appellant, did not attend school for a total of forty days (Tr. 4).[2] Of those forty absences, seventeen had either "no note/phone call" or no explanation at all (State's Ex. A). The remainder indicated that the absence was for "illness" or "Dr./Dentist Apptmnt" (State's Ex. A). A handwritten note on the Attendance Report indicated that someone (possibly "Mr. McBride") had "delivered homebound application," to appellant at "608 W. 5th St.," but that the application had "not been returned" (State's Ex. A).

At the time of Jennifer's absences it was the policy of the Caruthersville Accelerated Middle School to give notice to parents concerning student attendance after a certain number of absences (Tr. 6-7). Paula DeBoise, the deputy juvenile officer at the school, testified that

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[1] Jennifer turned fifteen on December 24, 2002, during the 2002-2003 school year (Tr. 3).

[2] Except for testimony from Paula DeBoise, the deputy juvenile officer at the school, the parties stipulated to the facts outlined in the prosecutor's opening statement (Tr. 3-4).

after three to five absences, the school sent a notice to parents (Tr. 7). DeBoise testified that after ten absences both the parents and the local prosecutor were notified (Tr. 6-7).[3]

Appellant did not testify, but she admitted Defendant's Exhibit 1, the school's Student/Parent Handbook (Tr. 9). The handbook informed parents that "[f]or excessive absences (10 or more during a semester), an attendance letter will be filed with the Prosecuting Attorney, Juvenile Authorities, Division of Family Services, and Board of Education" (Defendant's Ex. 1). The handbook described when and how absences could be excused and procedures for appealing decisions of the principal (Defendant's Ex. 1). At the close of all the evidence, the judge found appellant guilty of failure to cause a child to attend school on a regular basis (Tr. 12).

On October 9, 2003, appellant was sentenced to fifteen days in the Pemiscot County Jail (Tr. 13).[4] The judge suspended execution of the sentence and placed appellant on unsupervised probation for two years (Tr. 13). This appeal followed.

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[3] At the time of trial, DeBoise had only been the deputy juvenile officer for two months; she was not the officer employed during the charged time period (Tr. 6).

[4] Appellant was originally sentenced on October 6, 2003, but, having failed to grant allocution at that time, the court re-sentenced appellant on October 9, 2003 (Tr. 14).

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND ENTERING A VERDICT OF GUILTY, BECAUSE §§ 167.031 AND 167.061, RSMo 2000, GIVE CLEAR NOTICE TO A PERSON OF ORDINARY INTELLIGENCE THAT FAILING TO CAUSE A CHILD TO ATTEND SCHOOL FOR FORTY DAYS VIOLATES THE STATUTORY REQUIREMENT THAT A PARENT "SHALL CAUSE" HIS OR HER CHILD "TO ATTEND REGULARLY . . . NOT LESS THAN THE ENTIRE SCHOOL TERM" OR BE GUILTY OF A CLASS C MISDEMEANOR.

Appellant claims that the trial court erred in overruling her motion for judgment of acquittal, and thereafter entering a verdict of guilty (App.Br. 9). She claims that §§ 167.031 and 167.061, RSMo 2000, which define the crime of failing to cause a child to attend school on a regular basis, are void for vagueness (App.Br. 9). Specifically, she argues that an ordinary person cannot understand the following emphasized words and phrases of § 167.031, which states that a parent "**shall cause** the child **to attend regularly** some public, private, parochial, parish, home school or a combination of such schools **not less than the entire school term of the school** which the child attends" (App.Br. 11) (emphasis added). She also argues that the statute's use of the word "regularly" – absent a more definite period of time – encourages arbitrary and discriminatory application of the statute based upon the various policies

established in different school districts or counties (App.Br. 13).[5]

A. The Standard of Review

Statutes are presumed to be constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. State v. Stokely, 842 S.W.2d 77, 79 (Mo. banc 1992). If at all feasible, the statute must be interpreted in a manner consistent with the constitutions, and any doubt about the constitutionality of a statute will be resolved in favor of the statute's validity. Id.

B. Sections 167.031 and 167.061 Are Not Vague

There are two controlling standards for vagueness challenges to a criminal statute. First, a statute is vague if it fails to give notice to potential offenders of the prohibited conduct. State v. Callen, 45 S.W.3d 888, 889-890 (Mo. banc 2001). Notice is inadequate when the terms of the statute are so unclear that people of common intelligence must guess at their meaning. Id. at 890. Second, a statute is vague if it lacks explicit standards necessary to avoid arbitrary and discriminatory application by the state. Id.

1. Appellant Had Adequate Notice of the Prohibited Conduct

As outlined above, appellant argues that an ordinary person cannot understand the

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[5] Section 167.061 provides that any "parent . . . having charge, control or custody of a child, who violates the provisions of section 167.031 is guilty of a class C misdemeanor. Appellant indirectly challenges the validity of this statute by challenging the language of § 167.031.

following emphasized words and phrases of § 167.031, which states that a parent "**shall cause** the child **to attend regularly** some public, private, parochial, parish, home school or a combination of such schools **not less than the entire school term of the school** which the child attends" (App.Br. 11) (emphasis added). She claims that the failure to define "shall cause," "regular," and "entire school [term]"[6] leaves her "and any reasonable ordinary person guessing as to whether Section 167.061 RSMo. would apply to her conduct, or whether certain conduct even constitutes a crime" (App.Br. 11).

"It is, of course, virtually impossible for the legislature to employ the English language with sufficient precision to satisfy a mind intent on conjuring up hypothetical circumstances in which commonly understood words seem momentarily ambiguous." State v. Allen, 905 S.W.2d 874, 877 (Mo. banc 1995). "The constitution, however, does not demand that the General Assembly use words that lie beyond the possibility of manipulation." Id. "Instead, the

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[6] In her brief, appellants states "entire school **year**;" however, the challenged statute states "entire school **term**." This is significant because the two phrases have different statutory definitions. "A school year begins on the first day of July and ends on the thirtieth day of June following." § 167.031.4, RSMo 2000; see also § 160.041.1, RSMo 2000. However, a "'[s]chool term" is "a minimum of one hundred seventy-four school days . . . during a twelve-month period in which the academic instruction of pupils is actually and regularly carried on for a group of students in the public schools of any school district." § 160.011.(8), RSMo 2000.

constitutional due process demand is met if the words used bear a meaning commonly understood by persons of ordinary intelligence." Id. Additionally, when a statute is challenged as vague, it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing; rather, the language is to be evaluated by applying it to the facts at hand. Dorsey v. State, 115 S.W.3d 842, 844 (Mo. banc 2003); State v. Mahan, 971 S.W.2d 307, 312 (Mo. banc 1998); see also State v. Hatton, 918 S.W.2d 790, 793 (Mo. banc 1996) (when defining a criminal offense, the legislature is not held to impossible standards of specificity).

In the case at bar, the words and phrases challenged by appellant are commonly understood by persons of ordinary intelligence – especially when evaluated under the circumstances of appellant's case. The word "shall," when used in the third person, is "used . . . to express determination, compulsion, obligation, or necessity." Webster's New American Dictionary (1995). The word "cause," when used as a verb, means "to be the cause of, bring about." Id. "Regular" has various related meanings, including, "conforming to a rule," "conforming to a fixed principle or procedure," "customary or established," "consistent," or "functioning in a normal way." Id. The word "entire" (which is used in conjunction with the statutorily defined phrase "school term"[7]) means "not lacking any parts; whole; complete;

[7] Even if "school term" were not statutorily defined, a person of ordinary intelligence would have understood what the phrase meant. Due process requires no more than that the statute convey a sufficiently definite warning as to the proscribed conduct when measured by

intact." Id.

Given the plain and ordinary meaning of these words, when viewed in context, the language of § 167.031 is easily understandable, and it adequately informs the person of ordinary intelligence that she or he must cause her child to consistently attend school for the whole school term. See State v. White, 509 N.W.2d 434, 437-438 (Wis.App. 1993) (holding that compulsory attendance statute which stated that a person shall "cause the child to attend school regularly" was not vague). This would come as no surprise to the person of ordinary intelligence, and it certainly came as no surprise to appellant, whose daughter (a fifteen year old) had presumably already attended several years of compulsory education.

Compulsory school attendance is not a novel concept in the United States, and it has long been enforced by parents, principals, teachers, truant officers, and a host of other people who are charged in one way or another with the care, custody and control of children during the day. Indeed, it has long been recognized that compulsory education laws are vital to our society.

> The public policy in favor of compulsory education [that] § 167.031 expresses . . . reflects the broader desideratum of the organic law [Mo.Const.

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common understanding and practices. State v. Barnes, 942 S.W.2d 362, 366 (Mo. banc 1997). It is the common understanding and practice that public schools operate for a set period of time during the year, generally beginning in the fall and concluding in the spring or early summer.

> Art. IX, § 1(a) (adopted August 3, 1976)] that: "A general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people." These provisions for free public and compulsory education [or a private and equivalent alternative] constitute the very foundation of good citizenship and rank at the very apex of the function of a state.

In re Monnig, 638 S.W.2d 782, 788 (Mo.App. W.D. 1982) (citing Ambach v. Norwick, 441 U.S. 68, 77 (1979)) (bracketed material in original); see § 160.251, RSMo 2000 (setting forth the purpose of the "Excellence in Education Act of 1985").

And it is in this context that the common understanding of a person of ordinary intelligence must be judged. "[W]ords are to be construed in a manner consistent with the legislative intent, giving meaning to the words used within the context of the legislature's purpose in enacting the law." State v. Schleiermacher, 924 S.W.2d 269, 275-276 (Mo. banc 1996) (holding that "lingering outside" was not vague because the legislature's purpose – "to discourage and prevent domestic violence by limiting contact between members of a family or former residents of a household" – sufficiently limited the meaning of the phrase and resolved any ambiguity). Similarly, here, given the purpose of the statute – to provide a complete education and thereby preserve rights and liberties and lay the foundation for good citizenship – a person of ordinary understanding would understand what it means when the statute directs that a parent "**shall cause** the child **to attend regularly** some public, private, parochial, parish, home school or a combination of such schools **not less than the entire school term of the school** which the child attends." It is simply not possible (or at least it

strains reason) for a parent to read this language and conclude that she or he has no duty to cause her or his child to attend school for the whole school term. See State v. White, 509 N.W.2d at 437 (stating that the statute's heading – "Compulsory school attendance" – would cause a person of fair intelligence to conclude that school attendance is mandatory).

Moreover, if appellant had any question about her potential culpability under the statute, under the facts of this case, any question along those lines would have been laid to rest by the notices sent to appellant and the information contained in the Student/Parent Handbook. As outlined above, the deputy juvenile officer testified that after three to five absences parents were notified, and that after ten absences both the parents and the local prosecutor were notified (Tr. 6-7). Similarly, the Student/Parent Handbook informed parents that "[f]or excessive absences (10 or more during a semester), an attendance letter will be filed with the Prosecuting Attorney, Juvenile Authorities, Division of Family Services, and Board of Education" (Defendant's Ex. 1). Thus, in addition to the statute, appellant was put on notice of potential criminal liability when she was informed by the school that excessive absences (i.e. non-regular attendance) would be referred to the local prosecutor. That fact, combined with the plain language of the statute, served to adequately notify appellant that her daughter's numerous absences – her daughter's non-regular attendance – exposed appellant to criminal liability (for her failing to cause her child to attend).[8] See In re Jeanette L., 523 A.2d 1048,

[8] During the charged time period, there were approximately 102 school days (see Defendant's Ex. 1, which indicates that the first day of school was August 15 and identifies

1054-1055 (Md.App. 1987) (in rejecting a claim that the term "regularly" was vague and might be triggered by one absence, the court observed: "Because in these two appeals it is apparent that the children of the appellants were absent from school for substantial periods of time, the appellants need not puzzle over whether the act applies to a single absence. Irrespective of how one reads the statute, the extensive unexcused absences of the appellants' children are embraced within its scope.").

Lastly, appellant asserts that the statute is vague because it would allow prosecution of a parent when a child simply "did not want to attend school" and did not attend school (App.Br. 12). He argues, "[i]f nonattendance by a child is really to define whether or not a parent is in violation of these laws, we are lead [sic] to absurd conclusions" (App.Br. 12). But this argument fails to recognize that §§ 167.031 and 167.061 do not punish the parent for non-attendance; rather, they punish parents who fail to "cause the[ir] child to attend regularly." See In re Jeanette L., 523 A.2d at 1055 ("The statute does not subject a parent to prosecution for the actions of his or her children, but it does sanction prosecution for the parent's own acts.").

The statute requires (1) that a parent, guardian or other person, (2) having charge,

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approximately 20 vacation days between August 22 and February 6). Of those 102 school days, appellant's daughter missed 40 days (Tr. 4). Thus, appellant's daughter only attended school about 60% of the time during the charged time period. A person of ordinary intelligence would know that 60% attendance, under the compulsory attendance law, did not constitute regular attendance.

control, or custody of a child between the ages of seven and sixteen, (3) cause the child to attend school regularly not less than the entire school term. See § 167.031.1, RSMo 2000. It thus places an affirmative duty upon parents (and others) who have charge, control, or custody of a child between the ages of seven and sixteen. That duty is to assure that the child attends school regularly, and failure to perform that duty is a violation of the statute. Thus, for example, "[p]assive acquiescence in the child's nonattendance of school is no defense." See id. In short, while there may be many ways in which the statute might be violated by a parent, the elements of the crime are understandable to a person of ordinary intelligence, and the finder of fact can resolve any factual questions that arise in a given case. See generally State v. Bratina, 73 S.W.3d 625, 628-629 (Mo. banc 2002) (in concluding that § 194.425, which criminalizes abandoning a corpse, was not vague, this Court stated that while some facts could negate guilt, such factual questions can be resolved by the jury).

In short, when applied to the facts of the case at bar, it is evident that the language of §§ 167.031 and 167.061 is not vague. Any person of ordinary intelligence would know that failing to compel her or his child's regular attendance at school for the whole school term is a class C misdemeanor.

2. Section 167.031 Does Not Encourage Arbitrary Application by the State

Appellant also argues that the statute is vague because, by failing to define number of absences – "the specific length of time constituting each offense" – the statute gives prosecutors no guidance in applying the law (App.Br. 13). The result, appellant claims is "so much discretion that it would encourage arbitrary and discriminatory application" (App.Br. 13).

But this claim is without merit.

A statute encourages "arbitrary and discriminatory application" when it places "unfettered discretion" in the hands of the authorities. See Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972) (holding that vagrancy statute was unconstitutionally vague). However, under § 167.031, prosecutors do not have unfettered discretion. First, in addition to requiring mandatory attendance, § 167.031 sets forth exceptions to the general rule of mandatory attendance. These exceptions serve to limit the general application of the law and discourage arbitrary and discriminatory application, e.g., against parents with children who are mentally or physically incapacitated. § 167.031.1.(1)-(3), RSMo 2000.

Additionally, the use of the term "regularly" does not grant unfettered discretion to prosecutors. As is both commonly understood and required by statute, attendance at public schools is monitored by the school. § 171.151, RSMo 2000. Additionally, the school board of each school district is authorized to make "all needful rules and regulations for the organization, grading and government in the school district." § 171.011, RSMo 2000. Those rules become effective when a copy of the rules is deposited with the district clerk. Id. Consequently, as occurred in the case at bar, in applying §§ 167.031 and 167.061, prosecutors will be guided by set, written policies – policies that describe, as in the case at bar (see Defendant's Ex. 1), when and how certain absences can be excused and procedures whereby parents can appeal decisions of the principal. See State v. White, 509 N.W.2d at 214-218 (holding that use of the term "regularly" did not encourage arbitrary or discriminatory application of compulsory attendance law because there were other school policies that

provided guidelines for prosecutors); see also In re Jeanette L., 523 A.2d at 1055 (holding that the term "regularly" would not trigger prosecution for a single absence).

Moreover, under the facts of this case, it is apparent that the prosecutor only became involved after notices had been sent to appellant and after notice was subsequently sent to the prosecutor after appellant's daughter had garnered ten absences. This was consistent with the written school policy contained in the Student/Parent Handbook (Defendant's Ex. 1). The prosecutor then prosecuted the case, but only after appellant's daughter had garnered forty absences. Thus, even if the statute could be arbitrarily applied in some circumstances, it was not arbitrarily applied in the case at bar.

In sum, §§ 167.031 and 167.061, RSMo 2000, are not unconstitutionally vague. The language of the statute is easily understood by a person of ordinary intelligence, and it does not place unfettered discretion in the hands of the prosecutor. Moreover, as applied to the facts and circumstances of this case, the statute neither failed to inform appellant that she was neglecting her duty as a parent nor encouraged arbitrary or discriminatory application.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 3,793 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of April, 2004, to:

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